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SUPREME COURT OF THE UNITED STATES

NO: 82-6973

TYRONNE LINDSEY,  
PETITIONER

VERSUS

LOUISIANA,  
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA

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## TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	1
COUNTERSTATEMENT OF QUESTIONS PRESENTED.....	1
STATEMENT OF THE FACTS.....	2
ARGUMENT.....	2
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	7

## TABLE OF AUTHORITIES

Page

### UNITED STATES SUPREME COURT

<u>Jurek v. Texas,</u> 428 U.S. 276, 49 L.Ed.2d 929, 96 S.Ct. 2950, rehearing denied 429 U.S. 875, 50 L.Ed.2d 158, 97 S.Ct. 197, (1976) -----	2
<u>Zant v. Stephens,</u> U.S. _____, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983) -----	4

### FEDERAL CASES

<u>Williams v. Maggio,</u> 679 F.2d 381 -----	2
<u>Baldwin v. Blackburn,</u> 653 F.3d 942 (CA3, 1981) -----	3

### LOUISIANA CASES

<u>State v. Tyronne Lindsey,</u> 404 So.2d 466, affirmed after remand 428 So.2d 420 (La. 1983) -----	4
<u>State v. Narcisse,</u> 426 So.2d 118 (La. 1983) -----	2

IN THE  
SUPREME COURT OF THE UNITED STATES

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NO: A-921

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TYONNE LINDSEY,  
PETITIONER  
  
VERSUS  
  
LOUISIANA,  
RESPONDENT

---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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RESPONSE OF STATE OF LOUISIANA

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OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 404 So.2d 466, affirmed after remand, 428 So.2d 420 (La. 1983). On March 26, 1983, rehearing was denied by that court. After an extension of time, a petition for a writ of certiorari was filed in this Honorable Court.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF  
QUESTIONS PRESENTED

- I. Whether there is a constitutional basis to require statewide review in a death penalty case as opposed to parish (county) wide review.
- II. Whether the aggravating circumstance found by the jury were unconstitutional or unsupported by the evidence.
- III. Whether the invalidity of one aggravating circumstance requires reversal of a death penalty where other valid aggravating circumstances are found and supported by the evidence.

## STATEMENT OF THE FACTS

The facts of the case are stated fully in the Louisiana Supreme Court decision as reported at 428 So.2d 420, at 422.

## LAW AND ARGUMENT

### STATE'S ANSWER TO ARGUMENT I; RE: PROPORTIONALITY OF SENTENCE

In this argument, petitioner alleges that the State of Louisiana has created a limited district wide proportionality review of capital sentences. Furthermore, petitioner alleges that a parish (county) wide review as opposed to a state wide review violates federal constitutional due process requirements.

While petitioner acknowledges the existence of Rule 905.9.1 or Rule 28, Section 1(C), of the Louisiana Supreme Court rules, he nonetheless tries to support his argument by citing Jurek v. Texas, 428 U.S. 276, 49 L.Ed.2d 929, 96 S.Ct. 2950, rehearing den. 429 U.S. 875, 50 L.Ed.2d 158, 97 S.Ct. 197, (1976), and State v. Narcisse, 426 So.2d 118 (La. 1983).

In first response, the State respectfully points out that the quoted portion of Jurek, supra, on page 6 of petitioner's brief is wholly consistent with the Louisiana scheme. As in Jurek, supra, Louisiana provides prompt judicial review by a court with state-wide jurisdiction, that is, the Louisiana Supreme Court.

Furthermore, the deviation from parish (county) wide review to State wide review cited by petitioner in State v. Narcisse, supra, was caused because the case involved the first death sentence in the parish (county) in over fifty years. Meaningful review required deviation in that instance.

More importantly, this issue has been decided against the petitioner in Williams v. Maggio, 679 F.2d 381. Quoting from the opinion, it reads:

"Although the Supreme Court has referred to statewide reviews as commendable in the effort to ensure against an arbitrary imposition of the death penalty, it has never implied that such review is a constitutional requirement. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The review quoted above provides adequate safeguards against freakish imposition of capital punishment. Just as a review chosen from a cross section of the



community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty. We concur with the statement in the panel decision of this case that "we have heard nothing which would even hint at unconstitutionality, and wholly reject the argument."

Id. at 395.

Hence, petitioner can point to no federal due process violation because none exists in the review scheme as it stands.

Proportionality is a safeguard against arbitrary and capricious action by a jury in the imposition of a death sentence.

Thus, although the Louisiana Supreme Court's scrutiny of death penalty cases is directed initially to those murder cases within a given judicial district, its review is not limited to such thereby rendering less than statewide proportionality review constitutional. Baldwin v. Blackburn, 653 F.2d 942 (CA5, 1981).

STATE'S ANSWER TO ARGUMENT II,  
RE: UNCONSTITUTIONAL AGGRAVATING  
CIRCUMSTANCES AND/OR INSUFFICIENT  
EVIDENCE OF SAME.

In this argument, petitioner argues that the aggravating circumstances which were returned by the sentencing jury were unconstitutional, or not supported by the evidence.

Specifically, petitioner argues that an aggravating circumstance which forms an element of the crime should not be used again in the sentencing phase. Also, petitioner alleges that the use of "significant prior history of criminal activity" is unconstitutionally vague in its application to the present case. In addition, petitioner claims that there was insufficient evidence to support all three aggravating circumstances especially "creating a risk of death or harm to more than one person."

In first response, the State must defer to the original review of these allegations by the Louisiana Supreme Court. The sufficiency of evidence allegation can only be decided by a careful review of the record. This review was made and decided against petitioner. See State v. Tyrone Lindsey, 404 So.2d 466, affirmed after remand, 428 So.2d 430 (La.

With respect to the specific allegation concerning the unconstitutional nature of the aggravating circumstances found, the State must respectfully rely on the recent holding in Zant v. Stephens, \_\_\_ U.S. \_\_\_, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983).

Quoting from the opinion, it reads:

"The limited function served by the jury's finding of a statutory aggravating circumstance does not render Georgia's statutory scheme invalid under the holding in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. Under Georgia's scheme, the jury is required to find and identify in writing at least one valid statutory aggravating circumstance, an individualized determination must be made on the basis of the defendant's character and the circumstances of the crime, and the State Supreme Court reviews the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. The narrowing function of statutory aggravating circumstances was properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court, because these two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed. Moreover, the Georgia Supreme Court reviewed respondent's death sentence to determine whether it was arbitrary, excessive, or disproportionate. Thus the Georgia capital sentencing statute is not invalid as applied here." Pp. 2741-2744.

As the petitioner admits on page 14 of his brief, the Louisiana system for the death penalty statute is modeled on Georgia's. Thus, petitioner's arguments are not persuasive in light of Zant, *supra*.

Accordingly, there is no merit to this argument.

**STATE'S ANSWER TO ARGUMENT III;  
RE: INVALID AGGRAVATING CIRCUMSTANCES**

In this argument, petitioner alleges error in the failure to vacate a death sentence when one of the aggravating circumstances has been found invalid and other valid aggravating circumstances are found and supported by the evidence. As in Zant, *supra*,

petitioner claims that only speculation can be made concerning the effect of the invalid aggravating circumstance.

In first response, quoting from the Louisiana Supreme Court, the opinion after remand reads:

"Since the jury found one statutory aggravating circumstance (La. Code Crim.P. art 905.4(a)) and that circumstance is clearly supported by the record, we find it unnecessary to decide whether the jury erred in finding two additional aggravating circumstances. Even if the jury erred the error is harmless. State v. Narcisse, 426 So.2d 118 (La. 1983); State v. Moore, 414 So.2d 340 (La. 1982); State v. Mattheson, 407 So.2d 1150 (La. 1981), rehearing denied; State v. Monroe, 397 So.2d 1258 (La. 1981); State v. Williams, 383 So.2d 369 (La. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828; State v. Martin, 376 So.2d 300 (La. 1979), cert. denied, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297."

Id. at 424.

Hence, strong lines of jurisprudence indicates petitioner's position is not correct. Moreover, in the recent case of Zant v. Stephens, *supra*, it was stated:

"Respondent contends that the death sentence was impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a 'substantial history of serious assaultive criminal convictions,' for these instructions may have affected the jury's deliberations."

"Although the Court of Appeals acknowledged on rehearing that the evidence was admissible, it expressed the concern that the trial court's instructions 'may have unduly directed the jury's attention to his prior conviction.' But, assuming that the instruction did induce the jury to place greater emphasis upon the respondent's prior criminal record than it would otherwise have done, the question remains whether that emphasis violated any constitutional right."



"The effect the erroneous instruction may have had on the jury is therefore merely a consequence of the statutory label 'aggravating circumstance.' That label arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given. But we do not think the Georgia Supreme Court erred in its conclusion that the 'mere fact that some of the aggravating circumstances presented were improperly designated 'statutory' had 'an inconsequential impact on the jury's decision regarding the death penalty.' The instructions, see p. 2737 supra, did not place particular emphasis on the role of statutory aggravating circumstances in the jury's ultimate decision. Instead the trial court instructed the jury to 'consider all of the evidence received in court throughout the trial before you' and to 'consider all facts and circumstances presented in extenuation (sic), mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense.' App. 18. More importantly, for the reasons discussed above, any possible impact cannot fairly be regarded as constitutional defect in the sentencing process."

Thus, the decision in Zant has upheld the Louisiana Supreme Court's consistent ruling and affords petitioner no relief.

Accordingly, this argument has no merit.

### CONCLUSION

The limited function served by a jury's finding of a statutory aggravating circumstance does not render the Louisiana death penalty scheme unconstitutional as it is applied in the case.

In this case, the essential elements of a constitutional death penalty are present. The jury has made an individualized determination based on the defendant and the crime and the State Supreme Court has determined that the sentence was not arbitrary or disproportionate.

Therefore, this application is without merit and should be denied.

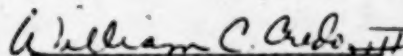
Respectfully Submitted,

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### CERTIFICATE

I, William C. Credo, III, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of September, 1983, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On petitioner, Tyrone Lindsey, through his counsel of record, William Noland, Esq. 2739 Tulane Avenue, Box 26183, New Orleans, 70184.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

  
**WILLIAM C. CREDO, III**  
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